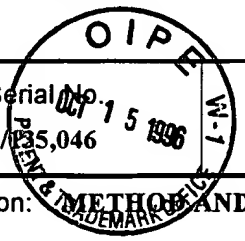
TRANSMITTAL OF APPEAL BRIEF (Small Entity)

Docket No.

In Re Application Of: **Garvin**

#20 2/3



Serial No.	Filing Date	Examiner	Group Art Unit
08/135,046	10/12/93	Crane	3201

Invention: **METHOD AND APPARATUS FOR TREATMENT OF BAGGED ORGANIC MATERIALS**

TO THE ASSISTANT COMMISSIONER FOR PATENTS:

Transmitted herewith in triplicate is the Appeal Brief in this application, with respect to the Notice of Appeal filed on: **August 9, 1996.**

Applicant is a small entity under 37 CFR 1.9 and 1.27.

A verified statement of small entity status under 37 CFR 1.27:

- ☐ is enclosed.
- ☒ has already been filed in this application.

The fee for filing this Appeal Brief is: **$150.00**

- ☒ A check in the amount of the fee is enclosed.
- ☐ The Commissioner has already been authorized to charge fees in this application to a Deposit Account. A duplicate copy of this sheet is enclosed.
- ☐ The Commissioner is hereby authorized to charge any fees which may be required, or credit any overpayment to Deposit Account No.
  A duplicate copy of this sheet is enclosed.

Robert L Harrington

Signature

Dated: Oct 7, 1996

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I certify that this document and fee is being deposited on 10-7-96 with the U.S. Postal Service as first class mail under 37 C.F.R. 1.8 and is addressed to the Assistant Commissioner for Patents, Washington, D.C. 20231.

Patsy R. Frye

Signature of Person Mailing Correspondence

Patsy R. Frye

Typed or Printed Name of Person Mailing Correspondence

cc:

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of: Garvin
Serial No.: 08/135,046 Group Art Unit: 3201
Filing Date: 10/12/93 Examiner: Crane
For: METHOD AND APPARATUS FOR TREATMENT OF BAGGED ORGANIC MATERIALS

Assistant Commissioner for Patents
Washington, D.C. 20231

Attn: Board of Patent Appeals and Interferences

APPELLANT'S BRIEF (37 CFR 1.192)

This brief is in furtherance of the Notice of Appeal filed in this case on August 9, 1996.

The fees required under §1.17(f), and any required petition for extension of time for filing this brief and fees therefor, are dealt with in the accompanying Transmittal of Appeal Brief.

This brief is transmitted in triplicate.

CERTIFICATE OF MAILING

I hereby certify that this document is being deposited with the U.S. Postal Service as First Class Mail and is addressed to: Assistant Commissioner for Patents, Washington, D.C. 20231, Attn: Board of Patent Appeals and Interferences, on the date indicated below.

Date 10/7/96

Patsy R. Prye

This brief contains these items under the following headings and in the order set forth below:

I REAL PARTY INTEREST

II RELATED APPEALS AND INTERFERENCES

III STATUS OF CLAIMS

IV STATUS OF AMENDMENTS

V SUMMARY OF INVENTION

VI ISSUES

VII GROUPING OF CLAIMS

VIII ARGUMENTS

ARGUMENT: VIIID REJECTIONS UNDER 35 USC 103

IX APPENDIX OF CLAIMS INVOLVED IN THE APPEAL

The final page of this brief bears the attorney's signature.

I. REAL PARTY IN INTEREST (37 CFR 1.192(c)(1))

The real party in interest in this appeal is the following party:

Ag-Bag International Limited, assignee of the entire rights of this application. The assignment is recorded at Reel 6745, Frame 0138.

II. RELATED APPEALS AND INTERFERENCES

(37 CFR 1.192(c)(2))

With respect to other appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in this appeal, these are as follows:

A Request for Interference was filed in U.S. Serial No. 08/435,144, a division of the present application, on May 5, 1995. An interference has not yet been declared.

III. STATUS OF CLAIMS (37 CFR 1.192(c)(3))

The status of the claims in this application is as follows:

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Claims in the application are 12.

B. STATUS OF ALL THE CLAIMS

1. Claims canceled: 7, 8, 10, 11 and 12
2. Claims withdrawn from consideration but not canceled: None
3. Claims pending: 1-6 and 9
4. Claims allowed: None
5. Claims rejected: 1-6 and 9

C. CLAIMS ON APPEAL

The claims on appeal are 1-6 and 9.

IV. STATUS OF AMENDMENTS (CFR 1.192(c)(4))

A Supplemental Amendment After Final Action Under Rule 116 was filed August 9, 1996. A similar amendment was filed on June 7, 1996. An Advisory Action dated July 2, 1996 advised applicant/appellant that if the amendment were filed but excluding the proposed "continuous" limitation, the amendment would be entered for purposes of appeal. The August 9, 1996 Supplemental Amendment is believed to comply with the examiner's suggestion. No indication has been received as to entry of the amendment.

V. SUMMARY OF INVENTION (37 CFR 1.19(c)(5))

This invention relates to a bag filling apparatus and method whereby a large plastic bag (e.g., 4-12 feet in diameter and 300 feet long) is used to fill the bag with materials such as grain, silage and materials to be composted and while stored, treating the materials with a medium, e.g., for drying, moisturizing or enhancing composition of the materials. (page 1, line 11 - page 3, line 14)

Whereas the apparatus and bags have been available (page 9, lines 11-23), the ability to treat the bagged material has not. This invention provides the apparatus with a fixed feed tube that extends from the machine exterior to the bag filling areas of the apparatus (page 10, lines 11-13), perforated conduit is fed through the feed tube and into the material during the bagging process (page 11, lines 1-15). The conduit is thereby extended through the length of the bag (page 3, lines 24-26, page 6, lines 15-17) and strategically placed in the bagged material (page 10, lines 13-16, page 8, lines 13-20, page 11, line 20, page 6, lines 17-18), and one end of the conduit is extended out of the bag (page 7, lines 19-21) for connection to a medium source exterior of the bag (page 8, lines 6-8). The placement of the perforated conduit and the provision of an exhaust vent provides movement of the medium through the material in the bag for selective treatment (page 3, lines 17-22; page 4, line 20 to page 5, line 1; page 11, line 20 to

page 12, line 4).

Following please find a comparison of the claims to the specification and drawing as suggested in Notice of May, 1988 (1092 OG 26-35).

1. A method for the treatment of a length of bagged material which comprises; (Fig. 2 and page 3, lines 12-14)

mounting an open end of a large flexible bag (10) and a gathered portion of the bag (10') onto a bag filling machine, (Fig. 2 and page 9, lines 14-22)

filling the bag (10) through the open end with material to be stored and treated during storage, said bag when filled defining a bag exterior wall and said filling including the progressive deployment of the gathered portion (10') of the bag, (Fig. 2 and page 9, lines 14-22)

during the bag filling process directing a perforated conduit (14) from a feed tube (54) mounted on the machine and through the open end of the bag into the material contained in the bag and spaced inwardly from the bag exterior wall, (Figs. 2 and 3, page 10, line 11 - page 11, line 3; page 11, lines 23-25) and upon filling the bag providing thereby a perforated conduit extended substantially through the entire length of the bagged material (Fig. 2 (see conduit end 18) and page 6, lines 15-17), extending an end of the conduit exterior of the bag (rearmost section 18 of Fig. 1 and page 7, lines 19-21), and

connecting the end of the conduit to a media source and flowing a media into and through the conduit to be passed through the conduit perforations and into the length of bagged material, and providing a vent (34) in the bag in a spaced relation to the conduit perforations whereby media flow from the conduit (14) to the vent induces media treatment of the bagged material (Fig. 1 and page 9, lines 3-9).

2. A method for treatment of bagged material as defined in Claim 1 wherein the media is air and the treatment provided thereby is for drying, and which method further includes forcing air from the media source through the bagged material and monitoring the moisture content of the material to determine the attainment of the desired moisture content (page 4, lines 17-22).

3. A method as defined in Claim 2 which further includes providing an exhaust portal (34) in the bag for exhausting air following treatment therewith of the material (page 4, lines 16-17).

4. A method as defined in Claim 3 wherein the bagged material is grain having a moisture content above 15%, and treating the grain while monitoring the moisture content to reduce the moisture content to at least 15% (page 4, lines 20-22)

5. A method as defined in Claim 1 which further includes

placement of the filled portions of the bag in a fixed location and causing deployment of additional portions of the bag by moving the machine relative to the filled portion of the bag (page 9, lines 18-22).

6. An apparatus for filling a large plastic bag with material to be stored and treated, the filled bag including venting to the atmosphere and defining a bag exterior wall surrounding and confining said material, said apparatus comprising;

a mobile machine including a materials receiving tunnel (46) and a delivery mechanism (40, 44) for delivering materials to the tunnel, said machine having a rear opening and structure surrounding said opening for receiving and deploying a large plastic bag (10) to be filled with material to be stored and treated, said structure defining a bag opening with the bag received thereon and said delivery mechanism causing the delivered material to flow through said tunnel and bag opening to be deposited into said bag (Fig. 2 and page 9, lines 14-22), and

a feed tube (50) mounted to the tunnel (46) and extended from exterior of said tunnel and exterior of a bag mounted on said tunnel and into the tunnel (page 10, lines 11-19), said feed tube defining a feed path for a conduit for directing a conduit provided with perforations through the open end of the bag and into the bag (page 11, lines 1-3, page 7, lines 1-2) in spaced relation to said bag exterior wall (page 10, lines 13-15) and the perforations in spaced relation to said venting (page 9, lines 3-9), whereby the

material in the bag is treated by forcing a media through the conduit and through the material in the bag followed by venting to the atmosphere.

VI. ISSUES (37 CFR 1.192(c)(6))

I. Whether Claims 1-6 and 9 are unpatentable under 35 USC 103 over Eggenmuller (U.S. Patent No. 3,687,061) in view of Taylor (U.S. Patent No. 4,230,676).

II. Whether Claims 6 and 9 are unpatentable under 35 USC 103 over Cullen (U.S. Patent No. 5,426,910).

Or Alternatively

Whether applicant's Claims 6 and 9 and claims of Cullen (U.S. Patent No. 5,426,910) claim the same invention so as to disqualify applicant's affidavit under 37 CFR 1.131.

ARGUMENTS - REJECTIONS UNDER 35 USC 103

(37 CFR 1.192(c)(8)(iv))

ISSUE I. Whether Claims 1-6 and 9 are unpatentable under 35 USC 103 over Eggenmuller (U.S. Patent No. 3,687,061) in view of TAYLOR (U.S. Patent No. 4,230,676).

Claim 1 defines applicant's method invention as filling a bag with material and during such filling of the bag directing a perforated conduit from a feed tube mounted on a bag filling machine into the material of the bag at a position within the bag interior, spaced from the bag wall (as dictated by the feed tube) and extended substantially through the entire length of the bag material. Following the filling step, one end of the conduit is extended to the bag exterior and connected to a media source which directs a media into the bag and through the perforations in the conduit and into the bag material. The above is sometimes referred to as a venting process and is distinguished from exhaust venting which provides for escape of the spent media into the atmosphere. This distinction is clarified in the claim with the provision of an exhaust vent which is located in the bag relative to the conduit to induce flow from the conduit and through the material before exhaustion of the media to the atmosphere.

Claim 6 defines applicant's invention as an apparatus for filling a bag with material to be treated including a feed tube mounted to the machine and extended from the exterior of the machine into the tunnel area of the machine whereat the material is staged for entry into the bag. The feed tube provides for the feeding of a conduit into the material of the bag spaced from the bag wall (as dictated by the end of the feed tube). The feed tube protects the conduit from the flowing material being directed into the tunnel and places the tube in a desired position in the bag whereat the material is substantially at rest. The material in the bag supports and maintains the conduit at the desired position.

THE CITED PRIOR ART

Eggenmuller discloses early versions of a bag filling machine. In a first version (see Figs. 3 and 4) the material is laid on a solid bottom wall, e.g., a concrete pad 12, and a foil 13 is placed over the material. A channel 32 is provided for ventilation which is permanently installed under the food mass on the bottom wall or is produced during the pressing process by suitable means. (Col. 5, lines 59-63) The "suitable means" for "pressing" in the channel appears to be disclosed in the following paragraph, i.e., at lines 64 et seq which is quoted below:

> "In order to be able to harvest partially cured hay in steps, the channel can be divided* for example by slide plate or the like through which a step like ventilation or drying of the feed is made possible." [*The word "divided" is probably intended to be "provided".]

Eggenmuller provides a second version (Figs. 10-12) wherein he bags the material and provides exhaust venting only. A ventilating pipe 54 is provided at the end of the mass or several ventilating pipes are provided along the bag length. (Col. 7, lines 53-57) These pipes as illustrated simply penetrate through the bag wall and part way into the bagged material to release pressure created by the fermenting silage. Also, suggested is an elongated air channel at the top of the bag for exhaust venting. This channel is not provided by pipe but by forming a channel in the food material by pressing.

> "It is also possible if necessary, to provide several ventilating pipes or relief pressure valves over the entire length of the food mass. In order to obtain a good ventilation it is also possible to form an air channel 56 in the mass of food during pressing thereof." (Col. 7, lines 61-66)

Eggenmuller achieves pressing of the product as explained thereafter (Col. 7, line 67 et seq) by using pressing worms 37 to press the food product against the boundary wall 8. How merely pressing the food product creates a channel is not explained and not apparent to the applicant. In any event, the channel is formed in the mass of food product and is not a perforated conduit (e.g., for connection to a media source) and in neither version is there disclosed a feed tube on the machine projected from the machine and exterior to the bag opening for discriminate placement of a conduit in the material of the bag.

Taylor provides conduits 20 that are first placed on the ground (supported on frame sections) and a windrow of material for composting is piled over the conduits. (See Col. 2, lines 44-46 and Col. 5, lines 11-13) As the pile height is increased, the conduits are raised to the desired position. (See Fig 2) There is no bag, no deployment of a cover during filling and there is no provision for feeding a conduit through a feed pipe of a bag filling machine.

Neither Eggenmuller nor Taylor disclose or suggest a feed pipe that extends from the exterior of the machine to the interior of the machine at the bag mouth to enable the feeding of a conduit into the material while being bagged so as to achieve a full length extension of the conduit in the bag with placement of the conduit through the feed tube determining the placement of the conduit in the filled bag, the material within the bag supporting the conduit in that position.

It is the feeding of the conduit into the bag through feed tubes on the machine that has enabled applicant to solve the problem of media treatment of the bagged material. Such feed tube feeding of the conduit cannot be gleaned from any proper combination of Eggenmuller in view of Taylor. Regardless of how these references are combined, they do not provide a teaching of all of the elements/steps of applicant's claims.

The examiner asserts that the claimed method and apparatus of applicant's Claims 1-6 and 9 is substantially shown by Eggenmuller in Fig. 10 and equates Eggenmuller's ventilating conduit 54 (used for exhaust venting) to applicant's media treatment conduit 14, the Eggenmuller conduit 54 only missing the perforations which are suggested by Taylor. (From Office Action dated 4/11/96 at page 2)

> "The claimed method and apparatus is substantially shown by Eggenmuller in Fig. 10, for example, where a bag 49 is positioned on the filling machine comprising tube holder 51 and boundary wall (shield) 8 so that the filled bag 49 is provided with a ventilating conduit 54. Several ventilating pipes can be provided and positioned over the entire length of the mass of material (see Col. 7, lines 61-65, of Eggenmuller)."

Tube holder 51 holds tube 49 in Eggenmuller. This "tube" is the bag and is secured to the machine's tunnel. The boundary wall 8 is a back stop that is tethered (57) to the machine to enable the pressing action to take place.

"Tube holder 51" has nothing to do with the placement of vent tube 54, which is a short section of pipe projected into the bag (tube) end for relief of gases caused by fermentation of silage being stored. The multiple exhaust pipe sections do not equate to applicant's continuous perforated conduit.

The combination of references does not teach the solution for placement of continuous conduit in the bag length during filling of the bag using a feed tube. All of the above are asserted by

applicant to establish that the examiner is in error in his rejection based on Eggenmuller in view of Taylor. As stated in the CAFC decision of In Re Newell at 13 USPQ 2nd 1248 at page 1250:

> "The determination of whether a novel structure is or is not 'obvious' requires cognizance of the properties of that structure and the problem which it solves, viewed in light of the teachings of the prior art."

Also from the Board of Appeals Decision in Ex Parte Levengood, 28 USPQ 2d 1300 (1993):

> "In order to establish a prima facie case of obviousness, it is necessary for the examiner to present evidence, preferably in the form of some teaching, suggestion, incentive or inference in the applied prior art, or in the form of generally available knowledge, that one having ordinary skill in the art would have been led to combine the relevant teachings of the applied references in the proposed manner to arrive at the claimed invention."
>
> - - - - -
>
> "That which is within the capability of one skilled in the art is not synonymous with obviousness."

ISSUE II. Whether applicants claims 6 and 9 and any claims of Cullen (U.S. Patent No. 5,426,910) claim the same invention so as to disqualify applicants affidavit under 37 CFR 1.131.

The authority of the Board to determine issues of "interference-in-fact" was addressed in Nitz v. Ehrenreich, 537 F2d 539, 190 USPQ 413 (CCPA 1976). This case is discussed in Chishum at 10-337 (§10.09[4][c][ii]) from which the following quote was taken:

> "In Nitz v. Ehrenreich — `The board has no authority to dissolve an interference; but interference in fact is an issue ancillary to priority which the board may decide at final hearing and this court may determine on appeal.'"

Reference is now made to the present application at page 12, lines 4-11. Applicant here explains that whereas he concedes that the feed tube is important to the invention, the conduit support mounted to the machine as distinguished from the feed tube is optional.

> "In all cases where flexible conduit is utilized, it is believed that a securely positioned rigid feed tube is important to avoid displacement due to material turmoil caused by the filling process. Whereas a rolled flexible tube is believed most convenient, it is **also** contemplated that rigid conduit sections may be utilized with the successive sections being coupled one to the other as they are fed through a straight tube and into the bag." (Emphasis added)

The conduit support (reel) for the conduit to enable the conduit to be mounted to the bag filling machine was specifically excluded from the broad claims of the application. It is to be noted that this conduit support is a different limitation than the feed tube, i.e, it is the support that supports the entire length of conduit to be placed in, e.g. a 300 foot bag length. The limitations including the conduit support being mounted on the bag filling machine were included only in Claims 7 and 8. During prosecution, Claims 7 and 8 were allowed and all other claims not including the conduit support were rejected.

At substantially the same period of time, the parent case to Cullen's U.S. Patent No. 5,426,910, namely U.S. Patent No. 5,345,744 was being prosecuted. Cullen pursued claims with and without the conduit support (referred to by Cullen as a pipe support). The Cullen claims were rejected. Cullen ultimately dropped the claims that did not include the conduit support and pursued the claims requiring the conduit support. After a number of amendments directed to the conduit (pipe) support, the Cullen claim in the '744 patent was granted.

Just prior to the grant of the '744 patent, Cullen filed a continuation application, again pursuing claims with and without the conduit (pipe) support. Again the claims were rejected and the `910 patent was ultimately granted with claims limited to the conduit support. The claims of the two cases were considered the

same invention for double patenting purposes and a terminal disclaimer was filed to overcome the double patenting rejection.

The examiner's rejection resulting in Cullen's acquiescence and amendment that added the conduit (pipe) support is set forth below:

> "Applicant's arguments filed September 6, 1994 have been fully considered but they are not deemed to be persuasive. Applicant argues that the applied references do not teach the claimed pipe support means. Applicant's arguments are not commensurate with the scope of the claims. The pipe positioning means is read as the end of the bag and stand 8 in Eggenmuller. The positioning means is read as a means for positioning or holding. The claims do not set forth the positioning means as a means for feeding the pipe to the bag interior and then stopping feed when the pipe is properly positioned. Further, the pipe support is read as the hole in the stand 8 of Eggenmuller. Therefore, the pipe support supports the pipe as the pipe is positioned on the stand and in the bag. The claims do not require the positioning means to feed the pipe to its place in the bag and on the device. It is the examiner's position that the invention of Claims 1-2 and 4-6 is fairly taught by the prior art."

The above prosecution history of the Cullen patent is of importance in that it is the process that determined what was patentable to Cullen, a process he participated in and concurred with. From that process, the patentable invention of Cullen specifically requires, in combination, the pipe support. This pipe support cannot be considered immaterial to the Cullen claims. No machine or process not including a pipe support mounted on the

machine can be considered an infringement of the Cullen claims, either as a direct infringement or under the Doctrine of Equivalents (in view of file wrapper estoppel).

In order to establish an interference with the Cullen patents, one would have to include the pipe support limitation. An argument that the pipe support limitation is an immaterial limitation of Cullen for the purposes of declaring an interference with the issued Cullen patent would necessarily fail. Such a claim (the claim minus the pipe support limitation) is not allowable to Cullen and cannot be the basis for interference with the Cullen patent.

From MPEP 2306, Interference Between An Application and a Patent, page 2300-15:

> "Since the claims of a patent may not be altered (except by reissue or reexamination), the applicant must claim the same patentable invention as is claimed in one or more claims of a patent in order to provoke an interference with the patent. The fact that the patent may disclose subject matter claimed by the applicant is not a basis for interference if the patent does not claim that subject matter."

Whereas applicant concurs that the claims of an application and the claim of a patent do not have to be exactly the same, it is required that the claim of the application claim the "same patentable invention as a claim of the patent". From MPEP 2306:

> "All that is required under present practice is that a claim of the application be

> drawn to the same patentable invention as a claim of the patent."

The examiner in the present case initially took a position consistent with that of the examiner in the Cullen cases. The examiner in the present case allowed those claims which included the conduit support and rejected the claims without the conduit support. Applicant in this case (unlike Cullen) is persisting in the allowability of the claims without the conduit support limitation. Those claims have now been rejected under 35 USC 103 (Office Action dated April 11, 1996) based on the Cullen patent. Applicant has assertedly removed Cullen as a prior art reference by the submission of an affidavit under 131. Applicant's invention predates the filing date of Cullen and Cullen does not claim the same invention, i.e., the Cullen claims must be considered as a whole and the Cullen claims require a material element/step not included in applicant's claims. The claims in issue do not qualify for interference with the Cullen claims and ipso facto a Rule 131 affidavit is appropriate for removing Cullen as a reference.

From "Chishum on Patents" at 3-139 to 140.10:

> "In 1988, in response to the Eickmayer decision, the Patent and Trademark Office amended Rule 131 to provide that the standard of identity of invention which precludes use of a Rule 131 affidavit or declaration to avoid a prior art reference, is the same as that used for determining interference."

The examiner in the present case refutes applicant's contention and is holding that the pipe support limitation is an immaterial limitation and accordingly it is his position that the Cullen patent(s) claim the same patentable invention as claimed by the claim here in issue. Accordingly, he has rejected applicant's 131 affidavit and this is error.

Applicant's claims do not include the pipe support limitation and cannot qualify for declaration of interference with the claims of the Cullen patents. It follows under the Patent and Trademark Office's own rules that if the claims do not qualify as the same invention for interference purposes, they do qualify under Rule 131 as claiming different inventions.

Also note the similarity of applicant's situation to that of In Re Braat, 19 USPQ 1289 at page 1292 (CAFC 1991). The Braat broader application claims were under rejection for double patenting based on the narrower claims of an issued patent to Dil (commonly owned). (Whereas the Braat case involves double patenting, note from MPEP 2306 under Interference Between An Application and a Patent, at page 2300-15: "The test is analogous to that applied for double patenting;". From the Braat case:

> "The crux of this appeal comes down to whether the Board erred in applying a `one-way' patentability determination instead of a `two-way' determination. The Board correctly found that the rejected claims of Braat are merely

> obvious variations of the invention described by dependent Claims 5/1 and 6/1 of Dil. The only difference between the claims of Braat and Claims 5/1 and 6/1 of Dil is the *omission* of the requirement in the claims of Dil of information areas having side walls which are angled at a particular angle, and we do not think that *omission* of such a limitation in the present case would constitute an unobvious modification. The issue is whether the Board erred in concluding that such a one-way determination was all that was necessary or whether it was necessary to also determine whether the claims of Dil are patentably distinct from the invention described by the rejected claims of Braat; i.e., whether the *addition* in the claims of Dil of side walls which are angled at a particular angle was merely an obvious modification over the invention claimed in Braat."

Following analysis, the court in the Braat case determined (at page 1293):

> "Thus a double patenting rejection is sustainable here only if Claims 5/1 and 6/1 of Dil are not patentably distinct from the subject matter defined by the rejected claims of Braat and the Board erred in sustaining the double patenting rejection without making such a two-way determination."

The issue of allowability when considering the addition of the conduit/pipe support has been decided. The present examiner allowed Claims 7 and 8 adding the conduit support to the herein rejected parent Claim 6. The same decision was made in the Cullen application where not once but twice the examiner there allowed the claims with the conduit/pipe support over the rejected parent

claims. Only when the decision is made from the opposite direction is the claim not considered allowable based on double patenting, i.e., the claims here in issue not including the pipe/conduit support are considered not allowable because now the pipe/conduit support is considered an immaterial limitation.

It is to be noted that Cullen is not qualified to make the claims of applicant in the present case. Regardless of how the interference is decided, applicant should still be entitled to the claims of the present application. If Cullen is determined to be the inventor of the claims in that case, then double patenting is not an issue and applicant's 131 affidavit would remove the Cullen reference. If applicant is determined to be the prior inventor, then it will be the claims of the divisional application that will be subject to double patenting and not the present application. A similar analysis applied to a different factual situation was used by the CAFC in Braat for determining the requirement for the two-way test.

Based on the examiners' own two-way test and in accordance with the holding of In Re Braat, the determination by this examiner that the limitation of the conduit/pipe support is an immaterial limitation for refusing applicant's 131 affidavit is error.

Applicant respectfully requests a reversal of the examiner's positions (a) that applicant's Claims 1-6 and 9 are not patentable

over Eggenmuller in view of Taylor and (b) that applicant's claims 6 and 9 are not patentable over Cullen.

IX. APPENDIX OF CLAIMS (37 CFR 1.192 (c)(9))

The text of the claims involved in the appeal are:

1. A method for the treatment of a length of bagged material which comprises;

mounting an open end of a large flexible bag and a gathered portion of the bag onto a bag filling machine,

filling the bag through the open end with material to be stored and treated during storage, said bag when filled defining a bag exterior wall and said filling including the progressive deployment of the gathered portion of the bag,

during the bag filling process directing a perforated conduit from a feed tube mounted on the machine and through the open end of the bag into the material contained in the bag and spaced inwardly from the bag exterior wall, and upon filling the bag providing thereby a perforated conduit extended substantially through the entire length of the bagged material extending an end of the conduit exterior of the bag, and

connecting the end of the conduit to a media source and flowing a media into and through the conduit to be passed through the conduit perforations and into the length of bagged material, and providing a vent in the bag in a spaced relation to the conduit perforations whereby media flow from the conduit to the vent induces media treatment of the bagged material.

2. A method for treatment of bagged material as defined in Claim 1 wherein the media is air and the treatment provided thereby is for drying, and which method further includes forcing air from the media source through the bagged material and monitoring the moisture content of the material to determine the attainment of the desired moisture content.

3. A method as defined in Claim 2 which further includes providing an exhaust portal in the bag for exhausting air following treatment therewith of the material.

4. A method as defined in Claim 3 wherein the bagged material is grain having a moisture content above 15%, and treating the grain while monitoring the moisture content to reduce the moisture content to at least 15%.

5. A method as defined in Claim 1 which further includes placement of the filled portions of the bag in a fixed location and causing deployment of additional portions of the bag by moving the machine relative to the filled portion of the bag.

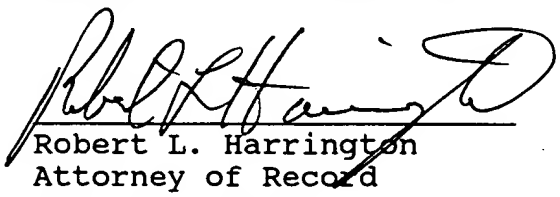
6. An apparatus for filling a large plastic bag with material to be stored and treated, the filled bag including venting to the atmosphere and defining a bag exterior wall surrounding and confining said material, said apparatus comprising;

a mobile machine including a materials receiving tunnel and a

delivery mechanism for delivering materials to the tunnel, said machine having a rear opening and structure surrounding said opening for receiving and deploying a large plastic bag to be filled with material to be stored and treated, said structure defining a bag opening with the bag received thereon and said delivery mechanism causing the delivered material to flow through said tunnel and bag opening to be deposited into said bag, and

a feed tube mounted to the tunnel and extended from exterior of said tunnel and exterior of a bag mounted on said tunnel and into the tunnel, said feed tube defining a feed path for a conduit for directing a conduit provided with perforations through the open end of the bag and into the bag, in spaced relation to said bag exterior wall, the perforations in spaced relation to said venting, whereby the material in the bag is treated by forcing a media through the conduit and through the material in the bag followed by venting to the atmosphere.

Respectfully submitted,



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